

2002

Bahman Dadgari, Plaintiff/Appellant, vs. Niloofar Bakti, Defendant/Appellee : Brief of Appellee

Utah Court of Appeals

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J. Thomas Bowen; attorney for appellee.

Scott B. Mitchell; attorney for appellant.

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J. THOMAS BOWEN #0396
Attorney for Defendant/Appellee
935 East South Union Avenue, Suite D102
Midvale, Utah 84047-2393
Telephone (801) 566-5298

IN THE UTAH COURT OF APPEALS

BAHMAN DADGARI,

Plaintiff/Appellant,

v.

NILOOFAR BAKTI,

Defendant/Appellee.

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) Case No. 20020682-CA
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**APPEAL FROM THE SUMMARY JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE MICHAEL BURTON, JUDGE**

APPELLEE'S ANSWERING BRIEF

Scott B. Mitchell (5111)
2469 East 7000 South
Suite 204
Salt Lake City, Utah 84121
Attorney for Appellant

J. Thomas Bowen (0396)
935 East So. Union Avenue
Suite D-102
Midvale, Utah 84047
(801) 566-5298
Attorney for Appellee

FILED
Utah Court of Appeals

AUG 18 2003

Paulette Stang

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J. THOMAS BOWEN #0396
Attorney for Plaintiff
935 East South Union Avenue, Suite D102
Midvale, Utah 84047-2393
Telephone (801) 566-5298

IN THE UTAH COURT OF APPEALS

BAHMAN DADGARI,)	
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v.)	
)	
NILOOFAR BAKTI,)	
)	
Defendant/Appellee.)	
)	

APPELLEE'S ANSWERING BRIEF

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal by virtue of UTAH CODE ANN. §78-2a-3 (2) (j).

ISSUES PRESENTED FOR REVIEW

Did the trial court correctly grant summary judgment to Appellee, Niloofar Bakti, finding that her foreclosure of the subject property was not barred by the statute of limitations.

STATEMENT OF THE CASE

This is an action by Bahman Dadgari to prevent Niloofar Bakti from foreclosing a promissory note and trust deed on property located in Salt Lake County. The court ruled, on summary judgment, that Ms. Bakti was not barred from proceeding with the foreclosure. Bahman Dadgari appeals from that adverse ruling.

STATEMENT OF FACTS

1. All of the parties involved are of Iranian descent, having come to Utah shortly after the Shah was deposed. Amir Hooshang Noshiravan and Fakhretaj Noshiravan (collectively the "Noshiravans") are husband and wife. Zahra Hajmohammadali ("Zahra") and Bahman Dadgari ("Bahman") are husband and wife. Bahman is the son of a good friend of the Noshiravans. Amir Farhang Noshiravan ("Farhang") and Niloofar Bakti ("Niloofar") are the son and daughter respectively of the Noshiravans.

2. The dispute involves a gas station and convenience store ("the Property") located on the Northwest corner of Highland Drive and 4500 South in Salt Lake City.

3. In 1986, the Noshiravans and Zahra each purchased a one-half interest in the Property. Bahman and Farhang thereafter leased the Property and operated it pursuant to an agreement between them.

4. Ultimately a dispute arose between Farhang and Bahman resulting in Bahman taking over the operation of the gas station and convenience store. Farhang sued Bahman and Zahra and obtained a judgment against them in 1994. Bahman claimed that he had no

assets and Zahra transferred her interest in the Property to Mansour Ariazand ("Ariazand"), ostensibly as security for loans Ariazand had made to Bahman. In 1995, Farhang brought an action against Zahra and Ariazand seeking to collect the funds that were due to him.

5. When the Property was purchased, the Noshiravans and Zahra as owners and Bahman and Fahrang as tenants executed a \$97,000.00 promissory note and trust deed in favor of U.S. Thrift & Loan (R. 48-54). In July, 1994, Niloofar purchased the note and trust deed from U.S. Bancorp, the successor to U.S. Thrift & Loan, and received an assignment of all the right, title and interest of the bank in the subject note and trust deed (R. 55).

6. Bahman stopped paying rent, insurance, taxes and other expenses of the Property, but because the Noshiravans only owned an undivided half interest, they could not evict him. The last payment on the note was made in August, 1993.

7. In 1994, Salt Lake County alleged that a gasoline spill had occurred on the Property and assessed cleanup costs against the owners. Bahman was occupying the Property during that time and was required to provide insurance that would have covered the spill, but he had failed to pay the premium. As a result, the County sued the Noshiravans, who in turn sued Bahman.

8. In February, 1995, Niloofar commenced a non-judicial foreclosure action by recording a notice of default with the Salt Lake County Recorder (R. 57).

9. In 1997, Salt Lake County announced that it would widen Highland Drive and condemn a portion of the Property for that purpose.

10. In December, 1997, the Noshiravans, Farhang, Ariazand, Bahman and Zahra entered into a settlement agreement ("Agreement") (R. 59-62) (*see*, Addendum). Under the terms of the Agreement, the parties attempted to resolve all of the issues that had arisen between them over the years. The Agreement was divided into two parts ("A" and "B"). Part A required Bahman and Zahra to pay \$25,000.00 to satisfy the claim of the County Fire Department relating to the fuel spill and another \$25,000.00 towards Farhang's judgment against them. Part B provided that the matters remaining between the parties, including the payments due to the bank, Bahman's failure to pay rent and taxes, improperly subrenting the Property and denying the Noshiravans access to the Property, would be "amicably rectified after application of part A." Upon resolution of part B, all litigation and claims, would be dismissed.

11. Because of the Agreement, Niloofar suspended foreclosure proceedings pending performance by Bahman and Zahra of part A of the Agreement and the amicable resolution of the remaining issues, including the payments due to the bank, required by part B.

12. In 1999, Bahman and Zahra acknowledged the validity of the Agreement, but contended that all of its terms had been performed by them. Judge Puelar ruled in Civil #950901726 that the provisions of the Agreement were still binding and that they had not been fulfilled by Bahman and Zahra.

13. The remaining issues were not resolved and in February, 2002, Niloofar filed a notice of a trustee's sale (R. 63).

14. In March, 2002, Bahman, who had subsequently obtained half of the Property from Ariazand and/or Zahra, (in spite of a prohibition of transfer contained in the trust deed) filed a complaint (R. 83-86) and obtained a preliminary injunction staying the trustee's sale. Niloofar answered Bahman's complaint and raised as affirmative defenses the timely commencement of the foreclosure proceedings, Bahman's acquisition of an interest in the Property in contravention of the terms of the trust deed and the execution of the Agreement (R. 33-39) . Both parties then filed motions for summary judgment. The District Court granted Niloofar's motion and dismissed the proceedings (R. 83-86). Bahman has appealed to this court.

SUMMARY OF ARGUMENT

Niloofar timely commenced foreclosure proceedings in this matter. Plaintiff has the burden of proving the applicability to the statute of limitations and has not met that burden. The intervening contract between the various parties tolled the running of the statute. In addition, the agreement of Bahman and Zahra to rectify the late payments to the bank and Niloofar's reliance thereon created an equitable estoppel which prevents Bahman from asserting the statute of limitations or creates an acknowledgment of the debt, which starts the limitations period running anew. The decision of Judge Burton was correct.

ARGUMENT

I

PLAINTIFF HAS THE BURDEN OF PROVING THE APPLICABILITY OF THE STATUTE OF LIMITATIONS

As provided by Rule 9 (h), Utah Rules of Civil Procedure, the burden of pleading and proving the applicability of the statute of limitations in this case rests on Plaintiff.¹

Plaintiff asserts that the statute of limitations now blocks Niloofar's foreclosure action and that the subject note and trust deed are void.

§78-12-23, UTAH CODE ANN. provides that:

an action may be brought within six years . . . (2) upon any contract, obligation or liability founded upon an instrument in writing.

§57-1-34, UTAH CODE ANN, provides:

The trustee's sale of property under a trust deed shall be made, or an action to foreclose the trust deed as provided by law for the foreclosure of mortgages on real property, shall be commenced, within the period prescribed by law for the commencement of an action on an obligations occurred by the trust deed.

The general rule of law is cited in 51 AM JUR 2d, Limitation of Actions, §243, p.

606-607 as follows:

The timely commencement of an action to foreclose a right before the statute of limitations is run ordinarily suspends the running of the statute with regard to that particular action. Thus, if the preservation of rights depends upon beginning an action within a definite time, the one upon whom the initiative

¹ *Conder v. Hunt*, 2000 Utah Ct. App. 105, 1 P.3d 558.

rests ordinarily keeps his or her right alive by making the appropriate move within the specified time.

In this case, Niloofar began her foreclosure less than six years from the date of the last payment on the note by recording the notice of default well within the time period provided by the statute of limitations; therefore, her trust deed and the note are still alive and the foreclosure may proceed.

Plaintiff's contention that the statute of limitations is applicable in this case is without merit.

II

THE INTERVENING CONTRACT TOLLED

THE RUNNING OF THE STATUTE

The general rule is that a cause of action accrues upon "the happening of the last event necessary to . . . the cause of action."² In December of 1997, Bahman, Zahra, Ariazand, Farhang and the Noshiravans entered into an agreement that specifically provided that the issue of the bank payments would be resolved once the other matters set forth in part A of the Agreement were satisfied. By executing the contract, Bahman represented that he intended to resolve the matter of late payments due to the bank (the obligation Niloofar had purchased in 1994) once his payment obligations to Salt Lake County and Farhang were satisfied. The parties agreed that the delinquent payments on the trust deed note, as

² *Becton-Dickerson & Company v. Reece*, 668 P.2d 1254 (Utah 1983).

well as other issues between them, would be amicably resolved once part A of the Agreement had been completed. Part A was not completed.

The Agreement specifically tolls the running of the statute until part A has been completed; therefore, even if the statute were applicable to this case, which it is not, it is tolled by the terms of the Agreement executed by Plaintiff. Application of the statute of limitations in this case is not appropriate.

III

BAHMAN'S AGREEMENT TO RESOLVE THE LATE PAYMENTS CREATED AN EQUITABLE ESTOPPEL

The doctrine of equitable estoppel may deprive a party of the defense of the statute of limitations if the other party was induced to delay timely action by the promise of the other to settle, pay, perform or otherwise carry out the obligation or duty in question.³

Niloofar relied upon the representations and promise of Bahman that he would rectify the problem of the late payments after satisfying the requirements of part A of the Agreement. Her reliance was reasonable and occurred within six years of the last payment on the debt. When Bahman failed to satisfy part A as promised, she immediately resumed her foreclosure efforts.

³ 51 AM JUR 2d, Limitation of Actions, §391, p. 698.

IV

THE AGREEMENT CONSTITUTED A GENERAL ACKNOWLEDGMENT OF THE DEBT AND STARTED THE STATUTE OF LIMITATIONS RUNNING ANEW

A promise to pay or an acknowledgment of the debt tolls the running of the statute of limitations and starts it running anew on the date of the promise or acknowledgment or on the date the promise is breached.⁴ If an acknowledgment or new promise is made before a debt is barred by the statute of limitations, it fixes a new date from which the limitations period runs.⁵ In December, 1997, Bahman, Zahra and others acknowledged the existence of the late payments due to the bank and promised that the matter would be amicably resolved after part A of the Agreement was satisfied. As such, the limitations period commenced to run anew, at the earliest, from December 1, 1997 to December 1, 2003. In 1999, in other litigation, Bahman and Zarha repeatedly acknowledged the validity of the Agreement, but contended that it had been fully performed. Judge Puelar ruled that the Agreement was binding, but that its terms had not been fully satisfied.⁶ It could be argued, therefore, that the statute of limitations did not actually begin to run until Judge Puelar's ruling. Such a

⁴ 51 AM JUR 2d, Limitation of Actions, §303, p. 645.

⁵ 51 AM JUR 2d, Limitation of Actions, §307, p. 647.

⁶ *Noshiravan v. Hajmohammadali*, Third District Court, Case #950901726, Judge Puelar.

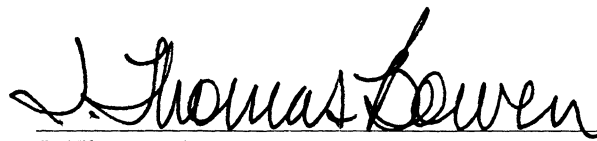
determination is not necessary, however, since Defendant would have sold the property, had she not been restrained by the court, on April 10, 2002, well within the December 1, 2003 deadline.

CONCLUSION

The statute of limitations is inapplicable in this case because a notice of default was filed within six years from the date of the last payment on the note. Even if the statute were applicable, which it is not, the Agreement tolled the statute pending a resolution of other issues mentioned therein. Equitable estoppel precludes Bahman from now asserting the statute of limitations because Niloofar reasonably relied upon Bahman's promise that the debt would be satisfied as soon as his obligations under part A of the Agreement were fulfilled. By signing the Agreement, Bahman acknowledged the existence of the debt and started a new limitations period, which runs out, at the earliest, on December 1, 2003.

Judge Burton correctly ruled that summary judgment was appropriate in favor of Niloofar and that Niloofar could proceed with the sale of the subject property.

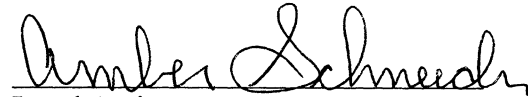
DATED this 18th day of August, 2003.


J. Thomas Bowen

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of August, 2003, I caused to be mailed, a true and correct copy of the foregoing **APPELLEE'S ANSWERING BRIEF** by placing the same in United States Mail, first class, postage prepaid to the following:


Scott B. Mitchell
2469 East 7000 South
Suite 204
Salt Lake City, UT 84121


Legal Assistant

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of August, 2003, I caused to be mailed two true and correct copies of the foregoing **APPELLEE'S ANSWERING BRIEF** by placing the same in United States Mail, first class, postage prepaid to the following:

Scott B. Mitchell
2469 East 7000 South
Suite 204
Salt Lake City, UT 84121


Legal Assistant

ADDENDUM

SETTLEMENT AGREEMENT

On April 7, 1992 and February 25, 1996, two agreements were provided and signed between the parties and signers below which were never performed. Regarding many changes that happened in that agreement and the subject property described as a gas station and convenience store under the name of Smith's Gas & Video Fuel that require full consideration, this agreement replaces the former ones with the following explanatory:

RECITALS

Dr. Amir H. Noshiravan and K. Fakhretaj Noshiravan (hereinafter referred to as "Noshiravans")

Amir Farhang Noshiravan (hereinafter referred to as "Farhang")

Mansour Ariazand (hereinafter referred to as "Ariazand")

Bahman Dadgari (hereinafter referred to as "Bahman")

Zahra Haj Mohammadali (hereinafter referred to as "Mohammadali")

WHEREAS the Noshiravans and Ariazand each owned one half of the above gas station and convenience store located at 4500 South Highland Drive (hereinafter referred to as "Gas Station");

WHEREAS Mohammadali formerly owned one half, having her interest Quit Claimed to Ariazand;

WHEREAS Bahman owned one-half ownership on the house on Spring Run Drive which he has transferred to his wife, Mohammadali, and she has transferred the entire property to Ariazand;

WHEREAS Farhang commenced an action against Mohammadali and Ariazand (Third Judicial District Cases No. 904905144 and 950901726) seeking inter alia to set aside Mohammadali's transference of the properties to Ariazand as a fraudulent conveyance;

ESD

Settlement

WHEREAS Ariazand has filed a counter claim against Farhang seeking to recover not less than \$41,700 as unpaid rent payment from said property;

WHEREAS Noshiravans incurred some expenses and attorney fees in connection with the above referenced litigations and property;

WHEREAS the County Attorney on behalf of the Fire Department has filed Case No. 940903980 with the Third Judicial Court asking for \$29,100 in damages incurred on that property;

WHEREAS TW Company has filed a claim to recover the cost of cleaning the area in the amount of \$19,000.00 (Case No. 940903980);

WHEREAS the Court has issued a General Decision in favour of the Fire Department and TWC; and the parties in this actin have settled for a total of \$25,000.00 to be paid to County and TWC;

WHEREAS at a Pre Trial scheduled August 7, 1997 before the Honorable Judge David Young, attended by Thom Bowen (attorney for Farhang), Dr. Amir Noshiravan and Bahman Dadgari, as well as Craig Anderson (Deputy County Attorney) and Stephen Elgreen, a verbal settlement was concluded that the owners and Bahman, as runner of the business, pay 50% of both claims, in the approximate amount of \$25,000.00;

WHEREAS the County has filed another claim stating that in performing the project to widen Highland Drive, another 5,000 square feet of this property was needed;

WHEREAS the County Appraiser assessed the entire property for \$200,000.00;

WHEREAS an offer has been received from John Park Assoc. for \$270,000.00, which \$70,000.00 greater than the County Appraiser's assessment;

WHEREAS the County has imposed a lien against the property either for \$25,000.00 verbal settlement or condemnation claim;

WHEREAS a claim is under negotiation between the Noshiravans and Bahman regarding the lack of monthly payments to U.S. National Bank, a mortgager, as well as other claim to close the Gas Station and collapse the price, and the other liens, etc.

C.S. D

12/14/97

imposed on the property;

WHEREAS a discussion has happened to possibly refer all the claims to arbitration;

WHEREAS the parties are willing to solve the cases amicably and through direct negotiations, this Agreement is entered into and performed on this 25th day of November, 1997 between the parties as follows:

PART A

1. Bahman and Zahra again mutually and collectively agreed to pay \$50,000.00 in cash. This amount has to be consummated as:
 - A. \$25,000.00 to be spent to satisfy the settlement with the County Fire Department and TW Company as stated at the Pre Trial Court on August 7, 1997.
 - B. \$25,000.00 to satisfy part of the Farhang claim. This amount would have to be paid by the end of 1997.

PART B

The claims of Farhang regarding the balance of his credit based on the Court Judgment and the Noshiravans regarding the late rent, late payments to bank, late taxes, subrenting the property, decreasing the price, and locking the use, attorneys fees, and legal expenses, etc., should remain and will be amicably rectified after application of Part A. Between Farhang, Noshiravans, and Bahman^{11/2} Mohammadali in this manner the claims and fraudulent transactions between Mohammadali, Dadgari and Ariazand, as well as the counter claim of Ariazand against Farhang, would be dismissed with prejudice after performance of the above explanations.

SALE OF PROPERTY

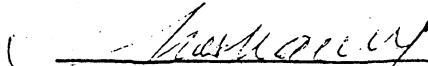
In conjunction with the condemnation of the property by the County as explained in the above Agreement, because the County assessment is in contrary to the offer received for \$270,000.00, even less than the County Tax Assessor said,

B.D.

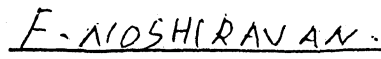
[Signature]
T. A. MARCH


\$217,000.00, the owner agrees to hire an independent assessor and ask for an appeal and award the County for prospective future rent from the date of condemnation, as well as the acquisition of the entire property instead of part (said 5,000 square feet), the owner has to pay their own tax part before the end of November to prevent any penalty. And part of his assessor fee. With payment of \$25,000 to satisfy the claims of the County and TW Company, the lien has to be removed, and Bahman & Mohammad Ali collectively have to remove any other liens on the property, leaving it with a clear title. After the execution of this Agreement, the claims should be dismissed with prejudice. (clear title does not include Niloofar Bakhti's Mortgage).


As stated in former documents, a copy of this Agreement should be filed with the Honorable Sandra Peuler. Then no need for arbitration. Dated this 1st day of December, 1997 in Salt Lake City, Utah.

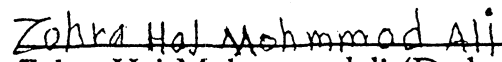

Dr. Amir H. Noshiravan


Mansour Ariazand


Fakhretaj Noshiravan


Bahman Dadgari


Amir Farhang Noshiravan


Zahra Haj Mohammadali (Dadgari)

25,000 portion of county and TW is paid to Noshiravan and
Ariazand with two post dated checks of 12,500 each.

B.D.